IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No.

MARGARET LOVISI

Petitioner,

v.

COMMONWEALTH OF VIRGINIA

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF FOR RESPONDENT IN OPPOSITION

The Respondent, the Commonwealth of Virginia, respectfully prays that the Writ of Certiorari requested by the Petitioner should not issue to review the judgment of the Supreme Court of Appeals of Virginia, entered November 8, 1971, which judgment affirmed the Petitioners Lovisis' conviction in the Circuit Court of the City of Virginia Beach, Virginia.

OPINION BELOW

The Petitioner, Margaret Lovisi, applied to the Supreme Court of Appeals of Virginia for a Writ of Error and Supersedeas to the judgment entered September 11, 1970, by the Circuit Court of the City of Virginia Beach; and on November 8, 1971, the Supreme Court of Appeals of Virginia was of opinion that there was no reversible error in the judgments complained of, rejected the Petitions, and refused the Writs of Error and Supersedeas, the effect of which was to affirm the judgment of the Circuit Court of the City of Virginia Beach.

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JURISDICTION

It is, respectfully urged that the instant case is not such a case as would commend itself for review under the Considerations Governing Review on Certiorari, as set forth in Rule 19 of the U.S. Supreme Court Rules. This case does not raise an issue involving a Federal question of substance; the Supreme Court of Appeals of Virginia did not tender a decision in conflict with the decision of another Court of Appeals on the same matter; the Supreme Court of Appeals of Virginia did not decide an important state or territorial question in a way in conflict with applicable state or territorial laws; the Supreme Court of Appeals of Virginia did not decide an important question of Federal law, which has not been, but should be settled by this Court, nor did the Virginia Court decide a Federal question in a way in conflict with applicable decisions of this Court, and it is respectfully submitted that the State Court has not departed from the accepted and usual judicial proceedings, as to call for an exercise of this Court's power of supervision.

QUESTIONS PRESENTED

The Respondent respectfully represents the question which can be considered by this Court for review in determining whether or not a Writ of Certiorari should issue to the Supreme Court of Appeals of Virginia be limited to those questions which were assigned as error to the Supreme Court of Appeals of Virginia for a Writ of Error to the Circuit Court of the City of Virginia Beach. Respondent's Appendix sets forth the Petitioner's Notice of Appeal and Assignment of Error, as follows as Exhibit A. Accordingly, the passing remarks made

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by the petitioner concerning photographs, which petitioner characterizes as obscene, do not seem to have a proper foundation laid.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent Statutes and Constitutional provisions involved are the First, Fourth and the Fourteenth Amendments to the United States Constitution, and the Supreme Court Rules, Rule Number 19, as set forth in Appendix B.

STATEMENT OF FACTS

In the Notice of Appeal and Assignment of Errors; the Petitioners urged the following as Error in the Circuit Court of the City of Virginia Beach, when addressing the Supreme Court of Virginia:

1. The trial Court erred in refusing to grant the defendant's motion for continuance.

2. The trial court erred in refusing to quash the indictment against the defendant on the grounds that §18.1-212 of the Code of Virginia, 1950, as amended, is unconstitutional under the laws of Virginia and of the United States.

3. The evidence was insufficient as a matter of law to convict the defendant of sodomy.

4. The trial Court erred in admitting into evidence Commonwealth's Exhibit #1.

5. The trial Court erred in refusing to set aside the verdict as being contrary to the law and evidence.

6. The trial Court erred in refusing to sustain the motion to strike the evidence of the Commonwealth.

7. The trial Court erred in granting instruction Number One.

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8. The trial Court erred in granting Instruction Number Two.

9. The trial Court erred in refusing to quash the indictment after it was amended.

The cause came on to be tried on September 11, 1970.

The Commonwealth presented its evidence, and the defendant then moved to strike the Commonwealth's evidence citing for its reason that the crime of sodomy was not established, and asserting that the sexual acts performed were private consentual acts rather than the public acts as contemplated by the statute. The defense urged at this time that the statute under which they were charged was unconstitutional citing as their reason that the statute should have excluded husband and wife, and in this Court, raises the sufficiency of a search warrant parenthetically without foundation.

ARGUMENT

1. Is Section 18.1-212 of the Code of Virginia, 1950, as amended, unconstitutional?

The appellant has set forth in full in his Petition for a Writ of Error the §18.1-212 of the Code of Virginia, 1950, as amended. The appellant urges that this statute as set forth is overbroad, "vague and an invasion of privacy, all in violation of the Virginia Constitution and the United States Constitution." He supports his position with the logic of a Texas case decided on a basis of the Texas sodomy statute found at Article 524 of the Texas Penal Code, which discusses distinctions as to whether or not the acts committed were in public or private, homosexually, or by married or unmarried persons. At the onset, the Commonwealth would like to state that there was no evidence offered by the defendant to prove

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that (a) the parties were married or (b) there was consent as between the parties. It is axiomatic that before one attacks a statute as being unconstitutional in its application to him, that one must first make some showing or introduce some evidence that would establish a foundation from which he can argue.

Not withstanding the obvious, if the defendant had shown herself to be married, that the statute should not be applicable because the acts were private and consensual, it is submitted that the evidence of the Commonwealth showed that the sodomous acts were committed and so committed in the presence of two small children and a third party, adult. The evidence is in conflict as to whether or not the children were present, but at no time was there any denial of the presence of the third party, Romeo Dunn.

It is uncontradicted that Dunn was present. To argue that the acts were private, consensual acts committed by married parties is incredible, as there is no showing of marriage, or of consent by the parties, or how the acts can be private when committed in the presence of a third party.

For these reasons, it is respectfully urged that a Writ of Certiorari be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on this the _____ day of _____ 1972, three copies of the Brief for the Respondent in Opposition to The Granting Of A Writ Of Certiorari, were mailed, first class postage prepaid, to Theodore A. Boyce, Esquire, Boyce and Spanoulis, 105 North Plaza Trail, Princess Anne Plaza, Virginia Beach, Virginia, and to Gerald Rubinger, Esquire, Parker and Rubinger, 1397 Laskin Road, Virginia Beach, Virginia. I further certify that all parties required to be served have been served.

ANDRE EVANS
Commonwealth Attorney
for the City of Virginia Beach
Municipal Center
Virginia Beach, Virginia 23456

PENELOPE D. COFFMAN
Assistant Commonwealth Attorney

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A P P E N D I X "A"

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

COMMONWEALTH OF VIRGINIA, :

Plaintiff :

v. :

MARGARET A. LOVISI :

Defendant :

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

To the Clerk of the Circuit Court of the City of Virginia Beach, Virginia:

Counsel for Margaret Lovisi, the defendant in the above styled case, hereby gives notice of appeal from the judgment entered in this case on the 11th day of September, 1970, and sets forth the following assignments of error:

1. The trial Court erred in refusing to grant the defendant's motion for continuance.

2. The trial Court erred in refusing to quash the indictment against the defendant on the grounds that §18.1-212 of the Code of Virginia, 1950, as amended, is unconstitutional under the laws of Virginia and of the United States.

3. The evidence was insufficient as a matter of law to convict the defendant of sodomy.

4. The trial Court erred in admitting into evidence Commonwealth's Exhibit #1.

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7. The trial Court erred in granting Instruction Number One.

8. The trial Court erred in granting Instruction Number Two.

9. The trial Court erred in refusing to quash the indictment after it was amended.

MARGARET LOVISI

By /s/ Gerald Rubinger
Of Counsel

Gerald Rubinger, p.d.
1756 Laskin Road
Virginia Beach, Virginia

Theodore A. Boyce, p.d.
105 North Plaza Trail.
Virginia Beach, Virginia
Of Counsel

A P P E N D I X "B"

STATUTES AND CONSTITUTIONAL PROVISIONS

U. S. SUPREME COURT RULES:

Rule Number 19.

A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

STATUTE:

Virginia Code §54-509.

Common Nuisances. -- Any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by narcotic drug addicts for the purpose of using narcotic drugs or which is used for the illegal keeping or selling of the same, shall be deemed a common nuisance. No person shall keep or maintain such a common nuisance. Repealed Acts of Assembly 1970, ch 650.

CONSTITUTIONAL PROVISIONS:

AMENDMENT XIV.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.